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No. 99-366

IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, ELIZABETH B. PARRY and HARRISON F. DURAND, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the Benefit of Elizabeth B. Parry, *et al.*,

Petitioners,

v.

GENE GAVIN, Commissioner of Revenue Services of the State of Connecticut,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF OF *AMICI CURIAE* RICHARD G. SMITH, III, ERIC CALHOUN AND BARBARA R. EVANS, TRUSTEES UNDER VARIOUS *INTER VIVOS* TRUSTS AND PIEDMONT FINANCIAL COMPANY, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether Connecticut's tax on the undistributed income of "resident" *inter vivos* trusts violates:

a. the dormant or negative Commerce Clause because such a trust does not have a substantial nexus with the State of Connecticut and the tax is neither fairly apportioned nor fairly related to benefits provided by the State of Connecticut; and

b. the Due Process Clause because there is no definite link or minimum connection between such a trust and the State of Connecticut and the tax is not rationally related to benefits and protections received by the trust or its beneficiaries from the State of Connecticut.

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Other Authorities:

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THE INTERESTS OF THE AMICI CURIAE

This brief is submitted in support of the Petition for a Writ of Certiorari. All parties have consented to the filing of this brief, and their written consents accompany this brief.

The amici are:[1]

Richard G. Smith III, Trustee of two *inter vivos* trusts established on December 20, 1935 by H. Smith Richardson, one for the primary benefit of Grace R. Stetson and the other for the primary benefit of Stuart S. Daly.

Eric C. Calhoun, Trustee of an *inter vivos* trust established on February 21, 1977, by John P. Richardson for the primary benefit of Wrenn B. Richardson.

Barbara R. Evans, Co-Trustee (with Richard G. Smith III) of an *inter vivos* trust established on December 28, 1934 by Grace Jones Richardson for the primary benefit of John Page Richardson.

Barbara R. Evans, Trustee of an *inter vivos* trust established on December 20, 1935 by H. Smith Richardson for the primary benefit of John Page Richardson.

Piedmont Financial Company, Inc., a New York corporation with its principal place of business in Greensboro, NC.

The undistributed income of the four *inter vivos* trusts identified above has been claimed to be subject to taxation by the Commissioner of Revenue Services of the State of Connecticut for years commencing in 1993 on the ground that each is a "resident" trust within the meaning of Conn. Gen. Stat. § 12-701(a)(4)(D). Tax appeals were filed on behalf of each of the trusts which appeals are pending in the Connecticut Superior Court. These tax appeals have been stayed by agreement of the parties pending this court's final determination of this case. Piedmont Financial Company, Inc. provides

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1. Counsel for these *amici* authored this brief in whole. No party made any monetary contribution to the preparation or submission of this brief.

investment management and administrative services to the trustees of each of the above referenced trusts.

SUMMARY OF ARGUMENT

The imposition of Connecticut income tax on the undistributed income of an *inter vivos* trust classified as a "resident" trust based solely upon the settlor's residence pursuant to Conn. Gen. Stat. § 12-701(a)(4)(D) violates the dormant Commerce Clause and the Due Process Clause when the trustee, assets and administration of the trust have been continuously located outside the State. In this case the parties to the *inter vivos* trust did not seek or obtain any judicial intervention. Even if they had, it is likely that the Connecticut Probate Court would have lacked subject matter jurisdiction and the Connecticut Superior Court would have lacked *in personam* jurisdiction to provide any relief. As a result, there were fewer benefits and protections provided by Connecticut than by the state(s) wherein the trustee and trust assets have been located. Due to the absence of benefits and protections the Connecticut tax is not fairly related to the services provided by the State.

There is no substantial nexus or even minimum connection between the State of Connecticut and an *inter vivos* trust based upon the residence of a settlor because the settlor might have executed the trust agreement in another state; intended, expressly or otherwise, that another state's law govern the trust; or resided for many years outside the State of Connecticut after creating the trust.

Calculation of the Connecticut undistributed income of a "resident" *inter vivos* trust in accordance with the 1993 amendment to the Connecticut tax statute results in an unfair apportionment and an irrational relationship between the undistributed income subject to taxation and the State of Connecticut. The statute does not require that the income subject to taxation be payable — either currently or eventually — to a Connecticut beneficiary. As a result, an income tax is due when there is at least one Connecticut noncontingent beneficiary even

when that beneficiary's right to receive income is withheld — either based upon a trustee's power or obligation to accumulate or the trust agreement providing that all capital gains are distributable to nonresident remaindermen. There is also unfair apportionment when the Connecticut noncontingent beneficiaries are entitled to a disproportionately smaller portion of the income than their *per capita* numbers would justify. Finally, an apportionment based upon the vague distinction between noncontingent or contingent interests is unfair because it is semantic; lacks substantive meaning; and is difficult if not impossible to discern with accuracy.

In rejecting the constitutional challenge to state taxation of the undistributed income of a "resident" *inter vivos* trust, the court below: (1) relied upon decisions in California and the District of Columbia which involved **testamentary** trusts wherein the challenge was based solely upon the Due Process Clause; (2) rejected a holding of this Court on the ground that it is no longer "good law"; and (3) adopted a holding which conflicts with holdings in New York, New Jersey and Michigan, each of which states has sustained constitutional challenges to substantially identical tax statutes.

ARGUMENT

I. CONNECTICUT LAW RELATING TO TAXATION AND JUDICIAL ADMINISTRATION OF *INTER VIVOS* TRUSTS[2]

A. The Connecticut Tax Statute

1. Sole Criterion For Determination Of Whether *Inter Vivos* Trust Is "Resident."

Conn. Gen. Stat. § 12-701(a)(4)(D) defines as a "resident" *inter vivos* trust one which was created by a person who was a resident of Connecticut at the time property was transferred to the trust (or, if a revocable trust, at the time the trust became irrevocable). Under this statute it is of no consequence whether

2. The *amici* concur with Petitioner's arguments concerning testamentary trusts. They will focus herein on *inter vivos* trusts.

the property transfer to the trust took place last year, 44 years ago or 64 years ago.[3] Nor is it of any consequence whether the settlor continued to reside in Connecticut thereafter; whether the trust was executed in Connecticut; or whether the trust agreement provides for a choice of law other than Connecticut.

When the statute was first enacted in 1991 (1991 June Spec. Sess. Public Act No. 91-3 § 52(a)(4)), it provided for an exemption from taxation of resident *inter vivos* trusts if: (a) all the trustees are nonresidents of Connecticut; (b) the entire corpus of the trust is located outside Connecticut; and (c) all income and gains of the trust are derived from or connected with sources outside Connecticut. As a result of this exemption, an *inter vivos* trust which satisfied the sole criterion of a "resident" trust would nevertheless be exempt from taxation of its undistributed income if the three requirements of the exemption were satisfied. Had this exemption continued, the *amici* would not be asserting the claims contained herein.

Effective as to taxable years commencing on or after January 1, 1993, the foregoing exemption was deleted. (May Spec. Sess. Public Act No. 92-17 §§ 11 and 59.) In lieu of this exemption, "Connecticut taxable income" was defined as that portion of interest, dividends and capital gains determined by application of a fraction, the numerator of which is the number of resident noncontingent beneficiaries and the denominator of which is the total number of noncontingent beneficiaries.

As amended the tax statute would purport to be applicable to many *inter vivos* trusts with little or no connection with Connecticut including, for example, the following: an irrevocable trust created and funded by a Connecticut resident in 1935 who left the State in the following year never to return thereafter in which the trustee, assets and administration of the trust have been continuously located outside the State and which

3. The *inter vivos* trust considered by the court below was created in 1955. Two of the *inter vivos* trusts administered by the undersigned amici were created in 1935 and one in 1934.

trust had at least one noncontingent beneficiary who happened to reside in Connecticut during the tax year in question — even though, under the terms of the trust agreement, that noncontingent beneficiary(ies) could not under any circumstances ever become entitled to any portion of the undistributed income subject to the tax.

2. The Extent Of The Undistributed Income Of A Resident Trust Subject To Connecticut's Tax

If a trust satisfies the single-pronged test of residency, then all of its undistributed income is subject to taxation regardless of whether its source is out of state. In the (fairly typical) event that all of the undistributed income is derived from investment, or intangible, property (e.g., interest, dividends and capital gains) held by the trust, the income is taxed without credit for any income tax paid to the state(s) where the investments are located.[4] Conn. Gen. Stat. § 12-704. In contrast, if a trust is classified as nonresident, then it is taxed only on Connecticut source income, e.g., income from real or tangible personal property or from trades or businesses located in Connecticut. Because it is fairly atypical for trusts to receive this type of income, the resolution of the "resident" status of an *inter vivos* trust normally has the consequence of determining that either all or none of the undistributed income is subject to taxation. Hence, the resolution of this issue is of critical importance.

It is important to understand that the only income of a trust which is in controversy in this case is *un*distributed income. To

4. This would result in double taxation if the trustee were located in a jurisdiction such as California; *McCulloch v. Franchise Tax Bd.*, 61 Cal. 2d 186, 390 P.2d 412 (1964) (*en banc*), *appeal dismissed*, 379 U.S. 133 (1964); or triple taxation if the beneficiary resided in a jurisdiction such as Virginia. *Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938). For other examples of multiple taxation, see Fogel, *What Have You Done For Me Lately? Constitutional Limitations On State Taxation of Trusts*, 32 U. Rich. L. Rev. 165, 213-14 (1998). It is not the purpose of the *amici* to repeat the Petitioner's forceful argument relating to the multiple taxation of "resident" trusts. The point being made here is that the Connecticut tax is not fairly apportioned.

the extent that a trust distributes income, it is entitled to a deduction and the beneficiary, not the trust, is subject to taxation. This is important because the current law apportions the exemption from taxation based upon the residences of noncontingent beneficiaries regardless of their: (a) present right to control or receive either principal or income; (b) relative share of principal or income *vis a vis* nonresident beneficiaries; and (c) status as beneficiaries of income or principal. It is completely possible, therefore, that the Connecticut noncontingent beneficiaries are not entitled to any portion of the undistributed income which is subject to the tax — either in the tax year in question or in any year thereafter.

Assume, for example, a Connecticut resident created an *inter vivos* trust with income to A, a Connecticut resident for his life, to be accumulated until age 25 and distributed annually thereafter until his death; upon A's death, all principal and any undistributed accumulated income are distributable to B, a New York resident. Assume that the trustee was a New York resident and that all assets and trust administration occurred in New York. If the taxable year occurred after A became 25 years old, the income would be distributed to A and taxable to him, not the trust. If the taxable year occurred before A became 25 years old, one-half of the undistributed income would be subject to Connecticut's tax due to A's status as a noncontingent beneficiary — even though A would not be entitled to receive or control any portion of the income in that year[5]. If A died

5. In the case of the *Adolfsson inter vivos* trust considered by the Connecticut Supreme Court, the sole income beneficiary had "no present right or control over the portion of the trusts that were generating income subject to Connecticut's tax. In each case, Connecticut only assessed an income tax upon realized capital gains and accumulated income that were not distributed to any beneficiary in 1993." Pet. App. 6a, n.8. The Connecticut residence of this noncontingent beneficiary was the "critical link" upon which the court sustained the constitutionality of the tax. Pet. App. 34a. Yet, that beneficiary had no right to the undistributed income in the tax year in question. And, if she dies prior

(Cont'd)

before his 25th birthday, he would never be entitled to receive or control the undistributed income for the tax year in question. Under these circumstances, the connection between Connecticut and A would be trivial or nonexistent depending upon the taxable year.

The burden of this income tax falls unfairly upon the shoulders of the New York resident who receives no benefits or protections from the State of Connecticut. The connection between Connecticut and the settlor may be even more remote than the connection between Connecticut and A. For example, as in the case of several of the trusts administered by the *amici*, the settlor may have created and funded the trust decades ago and left the State. Or the trust agreement of the Connecticut settlor might have been executed in another state, or if executed in Connecticut, it might have contained a choice of law provision selecting the application of another state's law.

Basing the exemption from income taxation of *inter vivos* trusts upon a head count of noncontingent beneficiaries can produce other bizarre results. For example, six Connecticut noncontingent beneficiaries might be entitled to an aggregate twenty percent of the trust's undistributed income while three New York noncontingent beneficiaries might be entitled to an aggregate of eighty percent of the trust's undistributed income. In this event, two-thirds of the undistributed income would be subject to Connecticut's tax even though they had only a one-fifth share of the income taxed.

Another example of the unfair burden of the tax is a trust, the assets of which consist of growth stocks with low income yields. Assume that the trust provides for the eventual distribution of principal, including capital gains[6], to nonresident

(Cont'd)
to 2008 (when she becomes 48 years old), she will never receive this undistributed income and it is currently unascertainable whether any Connecticut resident will eventually receive it.

6. Capital gains would ordinarily be considered as principal for the purpose of trust accounting. They are considered income under the Connecticut tax.

beneficiaries with current distribution of income (relatively minor dividend income) to Connecticut beneficiaries. Although the nonresidents will receive all the capital gains under the terms of the trust agreement, these capital gains are treated as "income" for tax purposes and are taxed to the extent that there are Connecticut income beneficiaries despite the fact that none of these beneficiaries will ever receive the capital gains. Again, the burden of Connecticut's tax unfairly falls upon nonresidents despite the absence of any connection between them and the State of Connecticut.

3. The Uncertainty Inherent In The Computation Of The Connecticut Income Of A Resident *Inter Vivos* Trust Subject To Taxation

The 1993 amendment to the Connecticut tax statute has created uncertainty in the proper computation of the Connecticut income of a "resident" *inter vivos* trust which is subject to taxation. The determination of which beneficiary is "noncontingent" depends upon whether that person's beneficial interest in the trust is "subject to a condition precedent." Conn. Gen. Stat. § 12-701(a)(4). Subtle changes in the language of a trust agreement can change a contingent remainder into a vested remainder or vice versa. The distinction between a vested interest and a contingent interest often exalts form over substance[7] and has confused experienced lawyers as well as judges. *Restatement of the Law of Property* § 157, Note on Terminology (1936).

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7. See, for example, Bergin and Haskell, *Preface To Estates In Land and Future Interests* (2d ed.) (Foundation Press, 1984), p.82; *White, Trustee v. Smith*, 87 Conn. 663, 673, 89 A.272 (1914) (" . . . 'Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, the remainder to such of his children as survive him, the remainder is contingent.' ") For example, if A were a Connecticut resident and had two children, each New York residents, Connecticut would tax one-third of the income in the first hypothetical and all of the income in the second. The only difference is semantic but it changes the fraction for determining Connecticut income from 1/3 to 1/1.

> It is often difficult to determine whether a given remainder is vested subject to complete defeasance or is contingent. The **form** of the limitation is of primary importance in solving the difficulty.

Howard, Trustee v. Batchelder, 143 Conn. 328, 334, 122 A.2d 307 (1956) (emphasis added).

The difficulty of achieving an accurate legal construction of the interest is compounded by the fact that owing to the idiomatic nature of language employed by draftsmen in describing future interests, "precedents are usually inconclusive." *Hartford National Bank and Trust Company v. Birge*, 159 Conn. 35, 42, 266 A.2d 373 (1970). As a result of basing the exemption on the accuracy of the determination of whether a beneficiary's interest as "noncontingent," an unreasonable burden has been placed upon fiduciaries, as well as the Commissioner of Revenue Services. If a fiduciary were to err in classifying a Connecticut beneficiary's interest as contingent, it might be liable to the State for understating the Connecticut income of a resident trust. If the fiduciary were to err in classifying a nonresident beneficiary's interest as contingent, it might be liable to the beneficiaries for overstating the Connecticut income of a resident trust.

B. The General Lack Of Judicial Administration Of "Resident" *Inter Vivos* Trusts in Connecticut

Much of the justification of the Connecticut Supreme Court for the constitutionality of taxing "resident" *inter vivos* trusts is based upon the so-called "protections and benefits" afforded by Connecticut. Pet. App. 35a-38a. When the Connecticut Supreme Court acknowledged that the taxation of "resident" *inter vivos* trusts is a "closer case than that with respect to testamentary trusts" (Pet. App. 34a) and that the connection between an *inter vivos* trust and the State is "more attenuated than in the case of a testamentary trust" (Pet. App. 35a), it implicitly recognized that, in reality, there are seldom any more protections and benefits for *inter vivos* trusts than for ordinary contracts.

There are no more formal requirements for the execution of such a trust than there are for contracts. At common law writings were not required. 1 Scott, *Trusts* (4th ed. 1989) § 39. Statutes of Frauds generally require writings only for trusts relating to real property. *Id.* § 40. Conn. Gen. Stat. § 52-550(a)(4). There are no more substantive requirements for mental capacity than there are for contracts. There are certainly no alternative provisions for the disposition of assets, such as laws of intestate succession. The *inter vivos* trust is not admitted to probate, and frequently never involves any type of court intervention. In fact, the ability to seek court intervention in Connecticut is significantly circumscribed so that even when it might be desirable, it is not attainable.

Consider the case of a "resident" *inter vivos* trust which had been covered by the 1991 exemption from taxation, i.e. where one or more noncontingent beneficiaries reside in Connecticut but: (a) the trustee is a nonresident or, if a corporation, does not maintain a place of business in Connecticut; (b) the assets of the trust are not situated or administered in Connecticut; and (c) the settlor does not currently reside in Connecticut or, if deceased, did not reside in Connecticut immediately prior to death. In such a situation the Connecticut Probate Court would lack subject matter jurisdiction to require a fiduciary's accounting or even to receive and approve such an accounting submitted by the fiduciary voluntarily. Conn. Gen. Stat. § 45a-175. It would lack subject matter jurisdiction to construe the meaning or effect of the trust instrument. Conn. Gen. Stat. § 45a-98. It would lack subject matter jurisdiction to terminate the trust. Conn. Gen. Stat. § 45a-484(d). The Superior Court's concurrent subject matter jurisdiction to construe a trust, require an accounting or discharge or replace a fiduciary would be dependent upon attaining *in personam* jurisdiction over the defendant(s) by serving the fiduciary properly within the State of Connecticut or through long-arm jurisdiction based upon an act committed within the State. Conn. Gen. Stat. §§ 52-59b and 33-929(f).

Thus, even if the trustee voluntarily sought to file an accounting for the Probate Court's approval, it could not do so. The Probate Court could not require such an accounting at the request of the Connecticut beneficiary. The Probate Court could not construe the trust agreement even if all parties agreed to the same. The Probate Court could not remove the trustee for cause or even appoint a successor with the consent of the parties.

II. CONSTITUTIONAL LAW RELATING TO STATE TAXATION OF *INTER VIVOS* TRUSTS

A. Connecticut Supreme Court Decision

In its ambitious undertaking to consider two separate challenges to the constitutionality of Connecticut's income taxation of four testamentary trusts and one *inter vivos* trust, the Connecticut Supreme Court devoted the great majority of its opinion to the testamentary trusts and the Due Process argument. As a result, too little attention was paid to the *inter vivos* trust and the dormant Commerce Clause argument.

1. Due Process Analysis

In its treatment of the single *inter vivos* trust before it, the Connecticut Supreme Court relied upon only one state court decision, *McCulloch v. Franchise Tax Board, supra*, which it described as a "closely analogous case" (Pet. App. 35a). In fact, *McCulloch* involved a testamentary trust. The beneficiary who received the income subject to taxation was both a co-trustee and a resident of the taxing state. *McCulloch, supra* at 188. The testator's will was admitted to probate in the taxing state and the administration of the testamentary trust was subject to the courts of the taxing state. *Id.* Thus, there are at least four distinguishing characteristics of *McCulloch*: (1) it involves a testamentary, not an *inter vivos*, trust; (2) one of the co-trustees, also a beneficiary, resided in the taxing state; (3) the beneficiary who resided in the taxing state actually received the income subject to the tax; and (4) the courts of the taxing state supervised the administration of the trust.

The remainder of the Connecticut Supreme Court's analysis of the Due Process clause relating to Connecticut's taxation of the *inter vivos* trust is devoted to its conclusion that this Court's holding in *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929) is no longer "good law." Pet. App. 34a. One of the principal authorities relied upon in support of this conclusion is a treatise[8] (Pet. App. 37a), the analysis of which itself has been criticized. *Fogel, supra*, 32 U. Rich. L. Rev. at 182-83. In any event it was inappropriate for the Connecticut Supreme Court to anticipate whether this Court would continue to follow *Safe Deposit & Trust Co.* today. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

In its consideration of the Due Process challenge to Connecticut's taxation of the *testamentary* trusts, the Connecticut Supreme Court relied most heavily upon *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. App. 1997) Pet. App. 30a-31a. The District of Columbia Court of Appeals expressly stated that it was not passing upon the constitutionality of a state tax on *inter vivos* trusts based solely upon the residence of the settlor. *District of Columbia*, 689 A.2d at 547, n.11. In doing so, it hinted that such a tax would be unconstitutional. *Id.* ("[T]he nexus between the trust and the District is arguably more attenuated, since the trust was not created by probate of the decedent's will in the District's courts. An irrevocable inter vivos trust does not owe its existence to the laws and courts of the District. . . . In some cases District courts may not even have principal supervisory authority over such an inter vivos trust.")

2. Dormant Commerce Clause Analysis

The Connecticut Supreme Court does not cite any state court authority rejecting a Commerce Clause challenge[9] upon

8. 2 J. Hellerstein & W. Hellerstein, *State Taxation* (1992) ¶ 20.09 [2], pp.20-68.

9. The Petition (p.15) states that the Connecticut Supreme Court followed *District of Columbia v. Chase Manhattan Bank, supra*, which, (Cont'd)

state income taxation of a trust — either testamentary or *inter vivos* — and the *amici* are unaware of the existence of any such precedent. To this extent then, the opinion below is one of first impression. In rejecting the Commerce Clause challenge, the Connecticut Supreme Court relied upon this Court's opinions in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Its analysis of the challenge was too restricted and considered only that portion of the argument relating to the trusts' exposure to multiple taxation and the likely effect of discriminating against interstate commerce.

B. The Connecticut Tax On The *Inter Vivos* Trust Violates The Dormant Commerce Clause

At least three of this Court's four prerequisites[10] for a state tax surviving a dormant Commerce Clause challenge cannot be satisfied in this case.

1. There Is No Substantial Nexus Between The "Resident" *Inter Vivos* Trust And The State Of Connecticut

Under the Connecticut tax statute the sole criterion of residency of the trust is whether or not the settlor was a Connecticut resident when the trust was created and funded. The residence of the trust rises or falls with the residence of the settlor only. The residences of the beneficiaries are relevant only to the calculation of the income which is subject to taxation. The residence of any particular beneficiary is subject to change

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(Cont'd)
it states, also rejected "a Due Process and Commerce Clause challenge" against a state's taxation of a trust. Although it is true that the court below relied upon this case in its Due Process analysis (Pet. App. 30a-31a), the District of Columbia Court of Appeals did *not* consider a Commerce Clause challenge. *District of Columbia*, 689 A.2d at 542, n.7.

10. *Quill Corp.*, 504 U.S. at 310; *Complete Auto Transit, Inc.*, 430 U.S. at 279.

and no Connecticut settlor is capable of the prescience required to ascertain residences of beneficiaries in future generations.

The settlor's residence as of the time of funding an *inter vivos* trust has no relevance to a tax imposed on the trust's undistributed income decades later. In this case, the settlor established the *inter vivos* trust in 1955 (Pet. App. 5a), and died many years prior to 1993 when the Connecticut tax statute took its present form. The settlor of this trust did not and could not have satisfied even the lesser Due Process requirement of "purposeful direction" of his activities in Connecticut during the tax year in question. *Quill Corp.*, 504 U.S. at 308. And, being deceased, he could not satisfy the Commerce Clause requirement of "physical presence" during the tax year in question. *Id.*, 317; *National Geographic Society v. California Bd. Of Equalization*, 430 Conn. 551, 559 (1977); *National Bellas Hess, Inc. v. Illinois Rev. Dept.*, 386 U.S. 753, 758 (1967).

2. The Connecticut Tax Is Not Fairly Apportioned

The extent of the income of a "resident" *inter vivos* trust subject to taxation in Connecticut is dependent upon a head count of noncontingent beneficiaries residing in Connecticut as compared with the universe of noncontingent beneficiaries. The determination of the extent of income subject to the Connecticut tax purely based upon this proportion of noncontingent beneficiaries does not result in a fair apportionment because:

a. The tax statute does not require that the trust income subject to taxation be payable to the noncontingent beneficiary. As a result, the Connecticut residence of a noncontingent income beneficiary who is not currently entitled to receive income (e.g. by virtue of either the trustee's discretionary power or his obligation to accumulate income) would cause taxation of the trust's income.

b. The income tax includes capital gains which trust agreements would classify as principal rather than income. Hence, a noncontingent income beneficiary residing in Connecticut would cause some portion of the capital gain to be

taxed in Connecticut despite the fact that the Connecticut income beneficiary may not ever be entitled to receive any portion of the capital gain being taxed. As a result, the burden of the tax would fall upon the nonresident, noncontingent remainderman.

c. The income tax treats all noncontingent beneficiaries as equal and interchangeable despite the fact that trust agreements may provide that some are entitled to a greater portion of income and/or principal than others. To the extent that a Connecticut noncontingent beneficiary is, under the trust agreement, entitled to a lesser portion of income and/or principal than a nonresident, noncontingent beneficiary, the tax is not fairly apportioned.

d. The Connecticut income of a trust subject to taxation is based upon an apportionment of "noncontingent" beneficiaries, the accurate determination of whom is difficult if not impossible for fiduciaries and tax officials and, even if done accurately, often leads to whimsical results. To the extent that the Connecticut income of a trust is dependent upon this determination, it is not fairly apportioned.

Separate and apart from these disparities, as stated in the Petition, the Connecticut tax does not provide for a credit for taxes imposed on the intangible income of the trust by another state(s) which might base its tax upon the residence of the trustee or the beneficiaries.

3. The Connecticut Tax Is Not Fairly Related To The Services Provided By The State

The opinion below states that the trustee did not maintain any presence in Connecticut during the tax year in question; that the assets of all trusts consisted of intangible investment property located out of state; that no trust received any Connecticut source income; that "no aspect of trust administration was conducted in Connecticut in 1993, and except for this proceeding [the tax case] and the probate court proceedings delineated later in this opinion, the plaintiff, as trustee, has not been the subject of any judicial or administrative proceeding in any Connecticut forum." Pet. App. 5a. The opinion

refers to certain probate proceedings for the four testamentary trusts, but no such proceeding for the *inter vivos* trust. The absence of any judicial intervention in the administration of an *inter vivos* trust is not unusual. In fact if the settlor did not reside in Connecticut immediately prior to his death, the Connecticut Probate Court would lack subject matter jurisdiction to require or even to entertain a judicial accounting. Therefore, even if the income beneficiary had sought its protection, the Probate Court lacked the ability to provide it.

The benefits and protections described by the Connecticut Supreme Court are illusory. It is meaningless to state that the income beneficiary "enjoyed all the protections and benefits afforded to other domiciliaries" (Pet. App. 35a) when there are no such protections and benefits relating to the trust. In other words, the fact that Connecticut might provide, for example, police and fire protection to the income beneficiary and other domiciliaries does not mean that Connecticut would or could redress a wrong relating either to the income beneficiary's interest in the trust or to other domiciliaries' interests in contracts or property beyond its jurisdiction. It is fanciful to state that the income beneficiary's right to "eventual" receipt and enjoyment of the accumulated income will be "protected" by Connecticut as long as she remained a Connecticut resident. Pet. App. 35a. The protection available in the forum where the trustee and the trust assets are located is far superior to that afforded by Connecticut where its courts' jurisdiction would be problematical at best.

C. The Connecticut Tax On The *Inter Vivos* Trust Violates The Due Process Clause

1. There Is No Definite Link Or Minimum Connection Between The State of Connecticut And The "Resident" *Inter Vivos* Trust

Although the Due Process focus is different from the Commerce Clause focus; *Quill Corp.*, *supra* at 307-08; nevertheless the "resident" *inter vivos* trust has no definite link or minimum connection with the State of Connecticut. Just as

it would offend traditional notions of fair play and substantial justice to impose *in personam* jurisdiction over an *inter vivos* trust merely because the settlor resided in Connecticut when it was created and funded in 1955; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); it offends these same notions to impose a state tax on such a trust. Unlike the mail order houses which "purposefully directed" marketing toward the taxing state, there is no reason to believe that a settlor of an *inter vivos* trust directs any attention toward the state of his residence when he creates and funds the trust. The settlor may have executed the trust agreement in another state or he may have selected the law of another state by express provision in the agreement.

The domicile of a settlor of an *inter vivos* trust is only one of eight factors[11] considered by courts in determining the appropriate law to be applied in a conflicts of law analysis. Its importance is not as great as the intention of the settlor or the location of the trust assets. 6 Scott, *Trusts* (4th ed.) § 555, pp.118-19; *Stetson v. Morgan Guaranty Trust Company of New York*, 22 Conn. Sup. 158, 160, 164 A.2d 239 (Super. Ct., Fairfield Co., Bogdanski, J. 1960).

When a settlor makes dispositive provisions in a trust agreement for the benefit of persons generations into the future, some of whom are unborn and unascertainable, he cannot possibly know or care about their residences. When a settlor names trustees in an *inter vivos* trust agreement, he cannot possibly know how long they will continue to reside in the state of their residence or whether they will ever wish to or be able to invoke the jurisdiction of the laws of his own state of residence.

In *Mercantile-Safe Deposit & Trust Co. v. Murphy*, 15 N.Y.2d 579, 203 N.E.2d 490 (1964) the New York Court of

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11. The eight factors are: 1. settlor's domicile; 2. place of execution of trust agreement; 3. language of trust agreement; 4. location of trust property; 5. trustee's domicile; 6. beneficiary's domicile; 7. place of administration of trust; and 8. settlor's implied intention. 6 Scott, *supra* at § 555, p.117.

Appeals sustained a Due Process challenge to a state tax provision substantially the same as the Connecticut provision, defining as a "resident" trust one in which the settlor was domiciled in New York when the trust was created. New York Tax Law § 605(b)(3)(C). The *Mercantile-Safe Deposit Co.* case is one of the few cases dealing with state income taxation of *inter vivos* trusts, as opposed to testamentary trusts. The trust in question was created by a New York resident who was also the income beneficiary. Upon his death, his spouse, also a New York resident, was given the right to the income of the trust subject, however, to the trustee's right to accumulate which was exercised. The trustee, the intangible assets and the administration of the trust were all located in Maryland. On these facts, the New York Court of Appeals found a violation of the Due Process clause because the surviving income beneficiary (the spouse residing in New York) had no present right to the control or possession of the income of the trust subject to taxation. *Id.* 581.

The instant case is similar to *Mercantile Safe-Deposit Co.* but provides a more compelling case for sustaining a Due Process challenge. Here, as in *Mercantile-Safe Deposit Co.*, the sole income beneficiary had no present right or control over the portion of the trusts that were generating income subject to Connecticut's tax. Pet. App. 6a, n.8. Here, unlike *Mercantile-Safe Deposit Co.*, the settlor himself was not an income beneficiary.

Other state court cases sustaining Due Process challenges to state income taxation of *inter vivos* trusts are *Blue v. Dept. of Treasury*, 185 Mich. App. 406, 462 N.W.2d 762 (1990) and *Potter v. Taxation Division Director*, 5 N.J. Tax 399 (1983). Both Michigan and New Jersey defined "resident" trusts in the same manner as Connecticut and New York. In the *Blue* case, the state of residence of the six residuary beneficiaries was not indicated. The court focused upon the in-state residence of the settlor and found that it afforded insufficient contact with the taxing authority. *Blue*, 185 Mich. App. at 410. In *Potter*, the

income beneficiaries resided out of state but certain contingent beneficiaries resided in state. The court found that the in-state residence of the contingent beneficiaries was not material because they had no right to the undistributed income subject to taxation. The same principle is applicable with equal force to a noncontingent beneficiary who has no right to control or receive income by virtue of the trustee's power or obligation to accumulate income.

The Connecticut Supreme Court expressly disagreed with the reasoning of the *Mercantile-Safe Deposit Co.*, *Blue* and *Potter* cases. Pet. App. 36a, n.25. The authority upon which it did so was *McCulloch, supra*, involving a testamentary trust, as well as its prediction that this Court's holding in *Safe Deposit & Trust Co., supra*, is not "good law."

2. There Is No Rational Relationship Between The Connecticut Tax And Any Benefits Or Protections Afforded By The State of Connecticut To The "Resident" *Inter Vivos* Trust

Like many other *inter vivos* trusts, the *inter vivos* trust considered below never sought — either through the settlor, the trustee or any of the beneficiaries — the aid of the Connecticut judicial system. Pet. App. 5a. And, if the settlor did not reside in Connecticut immediately before his death, none of the parties to the trust, including the resident beneficiary, could have obtained the aid of the Connecticut courts because the Probate Court would have lacked subject matter jurisdiction and the Superior Court *in personam* jurisdiction.

The Connecticut Supreme Court rejected the Due Process challenge, finding that during the tax year in question the income beneficiary "enjoyed all of the protections and benefits afforded to other domiciliaries." Pet. App. 35a. The simple truth is that there were no benefits and protections to this *inter vivos* trust provided by Connecticut; in fact, there were more benefits and protections available in New York than in Connecticut.

> The state cannot create hypothetical legal protections through a classification scheme whose validity is

> constitutionally suspect and attempt to support the constitutionality of the statute by these hypothetical legal protections.

Blue v. Dept. of Treasury, supra, 185 Mich. App. at 411.

The Connecticut Supreme Court is the first state appellate court to have rejected a constitutional challenge to state taxation of undistributed income of an *inter vivos* trust. The language of the Connecticut tax statute defining a "resident" trust is substantially identical to the New York, New Jersey and Michigan statutes considered in the three cases described above wherein constitutional challenges were sustained. As one of the commentators has stated, this statutory definition of a "resident" trust

> . . . is constitutionally flawed and fails to account for changing events that occur during the existence of a trust. In its place, the states may adopt a system that bases the state taxation of trusts on current connections between the state and the trust, such as the residence of the trustees or beneficiaries.

Fogel, supra, 32 U. Rich. L. Rev. at 230.

Connecticut stands alone in rejecting the constitutional challenge to state taxation of undistributed income of a "resident" *inter vivos* trust. The decision below is erroneous and conflicts with this Court's decisions, as well as the decisions of the highest courts of other states. This Court should grant the Petition in order to correct the error of the court below and to resolve the conflict which exists between the states.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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